

1 The Honorable Robert S. Lasnik
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

9 STATE OF WASHINGTON, et al.,)) No. 2:18-cv-1115-RSL
10 Plaintiffs,))
11 v.)) **FEDERAL DEFENDANTS'**
12 UNITED STATES DEPARTMENT OF)) **UNOPPOSED MOTION TO**
13 STATE, et al.,)) **SEAL SUPPLEMENT TO**
14 Defendants.)) **ADMINISTRATIVE RECORD**
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INTRODUCTION

The Federal Defendants have identified privileged information that was inadvertently disclosed in the supplement to the administrative record, Dkt. No. 179. The Federal Defendants are currently reviewing the entire supplement—spanning approximately 7,400 pages—to determine whether there were any other inadvertent disclosures. During the pendency of that review, which the Federal Defendants anticipate completing on May 6, 2019, the Federal Defendants respectfully request that the Court seal the supplement to the administrative record pursuant to Local Rule 5(g). This request is supported by the declaration of Shana A. Rogers, filed concurrently herewith.¹

STATEMENT OF FACTS

On March 19, 2019, this Court granted the Plaintiffs' Motion to Supplement the Administrative Record, Dkt. No. 132. *See* Dkt. No. 175. In its Order, the Court directed the Department of State, Secretary of State, Acting Deputy Assistant Secretary of Defense Trade Controls, and Director of Policy, Office of Defense Trade Controls Policy (collectively, "Federal Defendants") to supplement the administrative record to ensure that it includes: (1) "all materials considered, directly or indirectly, in making the decision to issue the July 27, 2018, temporary modification and letter . . . , regardless of whether the materials support or are contrary to the decision"; (2) "settlement-related communications and materials generated in *Defense Distributed v. U.S. Dep't of State*, C15-0372RP (W.D. Tex.)"; and (3) a "privilege log for all assertedly privileged documents and materials . . ." *Id.*

Following issuance of the Court’s Order, the Federal Defendants undertook an extensive search to ensure that records covered by the Court’s Order, including those previously omitted as privileged, were included in the supplemental record or identified on the privilege log. The Federal Defendants’ efforts included searches of more than 30 custodians’ records. Decl. of Shana A. Rogers, attached hereto as Exhibit A (“Rogers Decl.”), ¶ 4. The Federal Defendants’ collection yielded approximately 8,500 unique documents totaling

¹ So that Plaintiffs can have sufficient time to review any corrected version of the supplement, the parties anticipate filing a stipulation next week to extend briefing on the remaining briefs in support of their summary judgment motions.

1 approximately 9 GB of records. *Id.* After the Federal Defendants processed these records, they
 2 produced in full or in part almost 7,400 pages as the supplement to the administrative record on
 3 April 16, 2019. *Id.* ¶ 6; *see also* Dkt. No. 179. They also included a privilege log that spanned
 4 over 800 pages. Rogers Decl. ¶ 6; *see also* Dkt. No. 179-23.

5 On April 23, 2019, Defendants discovered—based initially on a filing by the plaintiff in
 6 a related case in the U.S. District Court for the Southern District of New York on April 19,
 7 2019—that the supplement contained a limited amount of privileged information that the
 8 Federal Defendants had intended to exclude and log, including information protected by the
 9 attorney client privilege and the attorney work product doctrine. Rogers Decl. ¶¶ 8, 10, 12.
 10 Based on an examination of the record at that time, this privileged information, which consists
 11 of email communications between the Department of Justice and Department of State
 12 attorneys, appeared in two documents within the supplemental materials. *Id.* ¶¶ 8, 10. The
 13 Federal Defendants did not intend to waive any privilege in connection with this information
 14 and maintain that such information is in fact privileged. *Id.* Indeed, the information was
 15 withheld elsewhere in the record but inadvertently disclosed in one instance due to an
 16 administrative error. *Id.* ¶¶ 7-10.²

17 On April 24, 2019, the Federal Defendants, through counsel, notified counsel for
 18 Plaintiffs, the Private Defendants, amici, and counsel in the aforementioned Southern District
 19 of New York matter of the inadvertent disclosure. *Id.* ¶ 13. Further, and consistent with
 20 Federal Rule of Civil Procedure 502(b), the Federal Defendants requested that these parties
 21 destroy any copies of the privileged documents and certify that they have been destroyed by
 22 April 29, 2019, and that they promptly identify, sequester, and destroy any notes taken about
 23 these documents. *Id.* Moreover, the Federal Defendants notified these parties that such
 24 information should not be referenced in subsequent pleadings or motions in this or any other
 25 case, nor should this information be disclosed to any person. *Id.*

27 ² Notably, the privileged communications were listed on Federal Defendants' privilege log as containing
 28 privileged information, including information protected by the attorney client privilege and the attorney work
 product doctrine.

The Federal Defendants are reviewing the supplement to the administrative record to ensure that no other privileged information was inadvertently disclosed. *Id.* ¶ 11. The Federal Defendants expect to complete this review by May 6, 2019. *Id.*

ARGUMENT

The Ninth Circuit recognizes a strong common law presumption in favor of public access to court records. *Foltz v. State Farm*, 331 F.3d 1122, 1135 (9th Cir. 2003). Therefore, a party seeking to seal a judicial record bears the burden of overcoming this presumption by meeting the “compelling reason” standard. *Id.* at 1135; see *Kamakana v. City and County of Honolulu*, 441 F.3d 1172, 1178-79 (9th Cir. 2006) (party must articulate compelling reason supported by specific factual findings that outweigh public policies favoring access and disclosure). Consistent with this requirement, Local Civil Rule 5(g)(3)(B) provides that a party moving to seal a document must set forth “a specific statement of the applicable legal standard and the reasons for keeping a document under seal, including an explanation of: i. the legitimate private or public interests that warrant the relief sought; ii. the injury that will result if the relief sought is not granted; and iii. why a less restrictive alternative to the relief sought is not sufficient.”

The Federal Defendants readily meet that standard. The Federal Defendants request that the Court seal the supplement to the administrative record because it contains at least two known instances of information protected by the attorney client privilege and the work product doctrine, i.e., information that includes the confidential provision of legal advice between the Department of Justice and the Department of State. *See, e.g., United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996) (attorney client privilege “applies to communications between lawyers and their clients when the lawyers act in a counseling and planning role, as well as when lawyers represent their clients in litigation”); Fed. R. Civ. P. 26(b)(3) (work product doctrine applies to “documents . . . that are prepared in anticipation of litigation or for trial by or for another party or its representative”). Additionally, there can be no serious dispute that the Federal Defendants’ request implicates legitimate public interests, or that injury will result if relief is not granted. “The attorney-client privilege serves the purpose of encouraging ‘full

1 and frank communication between attorneys and their clients and thereby promot[ing] broader
 2 public interests in the observance of law and administration of justice.”” *Stay@Home Design*
 3 *LLC v. Foremost Ins. Co. Grand Rapids, Michigan*, No. C16-1673-MAT, 2017 WL 1101369,
 4 at *3 (W.D. Wash. Mar. 24, 2017) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389
 5 (1981)). Similarly, “one goal of the work product doctrine is to create a ‘zone of privacy’
 6 within which [litigation-related] matters can be secure from discovery by parties with adverse
 7 interests.” *JumpSport, Inc. v. Jumpking, Inc.*, 213 F.R.D. 329, 334 (N.D. Cal. 2003); *see also*
 8 *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (work product doctrine promotes not only the
 9 legal profession, but “the interests of the clients and the cause of justice”).

10 Moreover, the Federal Defendants’ request is narrowly tailored. As noted above, the
 11 Federal Defendants are reviewing the supplement to determine whether any other privileged
 12 information was inadvertently disclosed. The Federal Defendants expect to complete this
 13 review on or before May 6, 2019. At that time, the Federal Defendants will refile a corrected
 14 version of the supplement on the public docket. Thus the supplement will remain under seal
 15 for a limited time, mitigating any harm caused by a lack of access to the non-privileged
 16 materials.

17 The Court should therefore find there are “compelling reasons” to seal the supplement
 18 pending completion of the Federal Defendants’ privilege review.

19 CONCLUSION

20 For the foregoing reasons, the Federal Defendants’ motion to seal should be granted
 21 until and including May 6, 2019, at which point the Federal Defendants will refile a corrected
 22 version of the supplement to the administrative record.

1 Dated: April 26, 2019

Respectfully submitted,

2 JOSEPH H. HUNT
3 Assistant Attorney General

4 JOHN R. GRIFFITHS
5 Director, Federal Programs Branch

6 ANTHONY J. COPPOLINO
7 Deputy Director, Federal Programs Branch

8 /s/Stuart J. Robinson
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21 *Attorneys for Federal Defendants*
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CERTIFICATION OF MEET AND CONFER

Pursuant to Local Civil Rule 5(g)(3)(A), I hereby certify that on April 24, 2019 and April 25, 2019, the Federal Defendants, through counsel Stuart J. Robinson, Eric J. Soskin, and Steven A. Myers, met and conferred by electronic mail and letter with Jeff Rupert and Kristin Bineski, counsel for Plaintiffs, and Joel Ard, counsel for the Private Defendants, regarding the Federal Defendants' proposal to seal the supplement to the administrative record for a limited time while the Federal Defendants conduct a review of the supplement for inadvertent disclosure of privileged material. The Federal Defendants, through counsel Stuart J. Robinson and Steven Myers, also met and conferred by phone with Matthew Goldstein, counsel for the Private Defendants, on April 26, 2019, and Eric J. Soskin conferred by electronic mail with Jeff Rupert and Kristin Bineski, counsel for Plaintiffs, on April 26, 2019. Counsel for Plaintiffs and the Private Defendants stated that they do not oppose the relief sought in this motion.

Dated: April 26, 2019

/s/ Stuart J. Robinson

Stuart J. Robinson

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2019, I electronically filed the foregoing motion using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: April 26, 2019

/s/ Stuart J. Robinson
Stuart J. Robinson

1 The Honorable Robert S. Lasnik
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

9 STATE OF WASHINGTON, et al.,) No. 2:18-cv-1115-RSL
10 Plaintiffs,)
11 v.)
12 UNITED STATES DEPARTMENT OF)
13 STATE, et al.,)
14 Defendants.)
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DEclaration REGARDING
PRIVILEGED MATERIALS IN
THE U.S. DEPARTMENT OF
STATE'S SUPPLEMENTAL
ADMINISTRATIVE RECORD

1 I, Shana A. Rogers, do hereby declare as follows:

2 1. I am employed by the U.S. Department of State (the “Department”) as an Attorney-
 3 Adviser in the Office of the Legal Adviser. I provide legal counsel to the Directorate of
 4 Defense Trade Controls within the Department’s Bureau of Political-Military Affairs and have
 5 served in this position since October 2015.

6 2. The statements made herein are based on my personal knowledge.

7 3. I am the primary agency attorney in the above-captioned case and served as the primary
 8 agency attorney in the matter of *Defense Distributed, et al. v. U.S. Department of State, et al.*,
 9 No. 1:15-cv-00372-RP (W.D. Tex.). I oversaw the review of documents collected in response
 10 to the Court’s March 19, 2019 order directing the Department to supplement the administrative
 11 record for the July 27, 2018, temporary modification and letter challenged in this litigation.

12 4. In response to the Court’s March 19, 2019 order, the Department conducted a search
 13 intended to identify potentially responsive records. Custodial and system searches were
 14 conducted for more than thirty individuals, which yielded more than 5,000 emails (with
 15 attachments) and other documents that were ingested into the Department’s electronic
 16 document review platform for a relevancy and privilege review. In addition, the Department’s
 17 Executive Secretariat (S/ES) performed a search of the S/ES email archives, which capture all
 18 e-mails sent on the network hosted by the Executive Secretariat, including e-mails sent to and
 19 from the offices of the Secretary, the Deputy Secretary, all of the Department’s
 20 Undersecretaries, and the Executive Secretariat staff. The S/ES archive search yielded almost
 21 6,000 emails (with attachments) and other documents, exceeding 17 GB of data, which
 22 received an initial screening for relevance before being uploaded into the electronic document
 23 review platform. After an automated de-duplication process, the total collection in the
 24 document review platform included 8,584 documents totaling approximately 9 GB of records.

25 5. As part of its response to the Court’s March 19, 2019 order, the Department also
 26 identified as responsive 105,555 emails generated by a page on the website “everytown.org”
 27 and sent to the Department between July 23 and July 27, 2018. Because the contents of such
 28 emails—apart from the personally identifiable information (“PII”) which the Department

1 determined should be redacted from public production—are identical, as a substitute for
2 production of all 105,555 emails, the Department produced a summary and a sample of four of
3 these emails, as part of the Supplemental Administrative Record (located at pages with Bates
4 stamps WASHAR0037069-0037074). The Department also identified and included in the
5 Supplemental Administrative Record 461 unique emails sent from members of the public to the
6 Department between July 23 and July 27, 2018 that were included in the Supplemental
7 Administrative Record with PII redactions.

8 6. The total collection in the document review platform was manually reviewed for
9 relevance and duplication, which reduced the number of responsive records. The Supplemental
10 Administrative Record documents over 4,600 records: approximately 680 records are produced
11 in full, approximately 680 records produced with redactions, and more than 3,200 records
12 withheld in full. The privilege log covers over 37,000 pages of records, and almost 7,400 pages
13 were produced in full or produced with redactions.

14 7. During the document review, a document located in the supplemental materials was
15 marked for withholding based on several privileges including deliberative intra-agency
16 discussions, the attorney work product doctrine, and attorney-client privilege, but was
17 inadvertently produced in full. The inadvertent production of this document resulted from an
18 administrative error during the review process. This document overlaps with approximately 50
19 documents in the privilege log to the Supplemental Administrative Record. All other
20 occurrences have been withheld in full.

21 8. This document contains privileged email communications between the Department of
22 Justice and Department of State attorneys. The Department intended to withhold this document
23 in full based on attorney-client privilege, the attorney work product doctrine, and deliberative
24 intra-agency discussions. The Federal Defendants did not intend to waive any privilege in
25 connection with this document.

26 9. During the document review, a second document located in the supplemental materials
27 was marked as protected by the attorney work product doctrine and attorney-client privilege but
28 was inadvertently produced in full. The inadvertent production of this document resulted from

1 an administrative error during the review process. This document overlaps with approximately
 2 130 documents listed in the privilege log to the Supplemental Administrative Record. One
 3 such entry is produced with redactions and the others have been withheld in full.

4 10. This second document contains privileged email communications between the
 5 Department of Justice and Department of State attorneys. The Department intended to
 6 withhold this document in full based on attorney-client privilege and the attorney work product
 7 doctrine. The Federal Defendants did not intend to waive any privilege in connection with this
 8 document.

9 11. The Federal Defendants are now conducting a comprehensive privilege re-review of the
 10 Supplemental Administrative Record, which is expected to be completed by May 6, 2019. The
 11 Federal Defendants anticipate filing a revised Supplemental Administrative Record and
 12 privilege log by May 6, 2019.

13 12. The Federal Defendants were alerted to the mistaken release of one of the privileged
 14 documents on April 23, 2019 when they were made aware of a letter to the United States
 15 District Court for the Southern District of New York in relation to the matter of *Stagg P.C. v.*
 16 *U.S. Department of State, et al.*, No. 15 Civ. 8468-KPF (S.D.N.Y.) ("Stagg"). This letter from
 17 Plaintiff's counsel in *Stagg* described and included several pages from one of the privileged
 18 documents. In response to this letter, the Department performed a preliminary re-review of the
 19 Supplemental Administrative Record and discovered that the second document also had been
 20 inadvertently produced.

21 13. On April 24, 2019, after assessing the situation, the Department of Justice sent letters on
 22 behalf of the Federal Defendants to counsel for the Plaintiffs, private defendants, and amici
 23 curiae in the above captioned case, and to Plaintiff's counsel in *Stagg*, noting that the Federal
 24 Defendants did not intend to waive any privilege in connection with the information
 25 inadvertently released. These letters requested that copies of these documents be destroyed and
 26 any notes taken about the documents be identified, sequestered, and destroyed, and that the
 27 parties certify that the documents and notes have been destroyed by April 29, 2019. The letters
 28 notified the parties that this information should not be referenced in subsequent pleadings or

1 motions in this or any other case, nor should this information be disclosed to any person.

2 14. On April 24, 2019, the United States Attorney's Office for the Southern District of New
3 York, which represents the United States Department of State, the Directorate of Defense Trade
4 Controls, and Secretary of State Michael Pompeo in *Stagg*, requested that the court in that
5 matter strike Plaintiff's letter and the attachments from the docket and require any parties that
6 have access to the documents destroy them or, in the alternative, that the documents be placed
7 under seal and sequestered by Plaintiff and any parties in possession of the documents. On
8 April 25, 2019, the *Stagg* court granted this request and ordered that the letter and attachments
9 be placed under seal and that the Plaintiff (and any other parties that are in possession of the
10 documents) sequester the documents until any privilege disputes can be resolved.

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12 Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is
13 true and correct.

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15 Executed this 26th day of April, 2019.



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18 Shana A. Rogers
19 Attorney-Adviser
20 Office of the Legal Adviser
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The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON, et al.,) No. 2:18-cv-1115-RSL
Plaintiffs,)
v.)
UNITED STATES DEPARTMENT OF) **FEDERAL DEFENDANTS'**
STATE, et al.,) **UNOPPOSED MOTION TO**
Defendants.) **SEAL SUPPLEMENT TO**
) **ADMINISTRATIVE RECORD**
)
) **NOTED FOR: April 26, 2019**

[PROPOSED] ORDER

This matter comes before the Court on the Federal Defendants' Unopposed Motion to Seal the Supplement to the Administrative Record. Upon consideration of the Federal Defendants' motion and of all materials submitted in relation thereto, it is hereby

ORDERED that the Federal Defendants' motion is GRANTED. It is further

ORDERED that the clerk of court SEAL the supplement to the administrative record, Dkt. No. 179. It is further

ORDERED that all parties in possession of the information identified in the Federal Defendants' clawback letter of April 24, 2019, sequester those documents until any privilege disputes are resolved; it is further

ORDERED that the Federal Defendants shall refile a corrected supplement to the administrative record on or before May 6, 2019.

IT IS SO ORDERED.

Date: _____

ROBERT S. LASNIK
United States District Judge